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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln. No.: 10/668,599
Applicant : Stacy J. Driskell, *et al.*
Filed: September 24, 2003
Title: DISPOSABLE ARTICLES WITH WETNESS
INDICATOR
Group Art Unit: 3761
Examiner: Michele Kidwell
Confirmation No.: 1527
Notice of Appeal Filed: February 8, 2007
Docket No.: 28135

APPEAL BRIEF UNDER 37 C.F.R. §41.37

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

May 25, 2007

Sir:

Appellant hereby requests consideration and reversal of the Final Rejection dated November 15, 2006, of claims 28-30.

This Brief is presented in the format required by 37 C.F.R. §41.37, in order to facilitate review by the Board.

The fees for filing a Brief in support of an Appeal under 37 C.F.R. §41.20(b)(2), together with any extension fee in connection with the filing of this Brief, are provided herewith.

05/29/2007 MGE BREM1 00000004 503005 10668599

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(i.) REAL PARTY IN INTEREST

The Real Party in Interest in this matter is Tyco Healthcare Retail Services AG by virtue of the Assignment recorded on July 8, 2004 at Reel/Frame 014829/0402.

(ii.) **RELATED APPEALS AND INTERFERENCES**

There are no related appeals or interferences related to the subject matter of this Appeal.

(iii.) **STATUS OF CLAIMS**

Claims 28-30 are presently pending; all claims stand rejected. Claim 28 is an independent claim. All claims are under appeal.

(iv.) **STATUS OF AMENDMENTS**

There are no outstanding amendments. The claims as they stand are set forth in the Claim Appendix

(v.) **SUMMARY OF CLAIMED SUBJECT MATTER**

The following summary is provided for all the claims. Exemplary references to the specification and figures are provided for purposes of non-limiting illustration with respect to selected exemplary embodiments of the invention.

Independent claim 28 is directed to a method of making an absorbent article by providing a top sheet, a back sheet and an absorbent core at least partially positioned between the top sheet and back sheet. A wetness indicator graphic is positioned between the back sheet and the absorbent core, while an unregistered graphic is positioned in a waist portion of the article. The unregistered character graphic is applied to the waist portion of the article from a web having printed thereon repeated images. The wetness indicator graphic and unregistered character graphic are related to one another, but not

interactively so. See, for example, page 37, ¶0094 through page 40, ¶00100 in conjunction with Figure 6.

Other embodiments of the invention recited in claims 29 and 30 are directed to details of cutting the web at certain predetermined intervals. See page 45, ¶00113.

(vi.) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 28-30 are currently pending in this application and have been finally rejected. Claims 1-27 and 31-66 have been cancelled. Claim 28 is the sole independent claim remaining in the application, and all other pending claims (claims 29 and 30) ultimately depend from claim 28.

Claims 28-30 stand rejected under 35 USC §112, ¶2, as being indefinite for failing to particularly point out and distinctly claim the invention.

Claims 28-30 also stand rejected under 35 USC §102(b) as being anticipated by Timmons, *et al.* (U.S. Patent No. 4,022,211).

No claims in the application have been allowed.

(vii.) ARGUMENT

A. Summary of the Argument

Indefiniteness

Applicants are of the view that the claims are not indefinite since there is no ambiguity as to what is intended based on a fair and objective reading of the claims and specification. Although the Examiner contends that there is some ambiguity between claiming an unregistered character graphic and a character graphic, applicants do not agree

with this interpretation of the claims. The term “character graphic” is used to refer to an image imprinted on a web which is, in turn, positioned in the waist portion of the article. This section of the claim clearly dealing with the use of a web refers to the unregistered character graphic which provides antecedent basis for the use of the term. The term “unregistered”, in the context of the invention, simply refers to the fact that the placement of the graphic on the article is not controlled. See, paragraph [0041], at pages 13 and 14 of the present specification. These terms are well-known in the art of absorbent articles. Applicants respectfully submit that the scope of the claims is reasonably ascertainable by one skilled in the relevant art in accordance with the provisions of 35 USC §112, second paragraph. See *Ex parte Porter*, 25 USPQ2d 114, 1146 (B.P.A.I. 1992).

Anticipation

“Character graphics” are defined in the present specification as denoting graphics containing anthropomorphic images, and in particular images having or suggesting a human form or appearance which ascribes human motivations, characteristics or behavior to inanimate objects, animals, natural phenomena, cartoon characters, or the like. See paragraph [0033], page 11 of the specification.

Although the Examiner maintains that Timmons, *et al.* discloses character graphics, this is not the case. Figs. 1-4 of the reference show graphics in the form of broken zigzag and wavy lines. Figs. 5 and 6 of the reference show graphics in the form of alphabet blocks. These graphics do not fall within the scope of the character graphics claimed in the present application. Accordingly, since the reference fails to disclose each and every element of the claimed invention, the claims cannot be anticipated by the reference. See *Verdegaal Bros. v.*

Union Oil Co. of California, 814 F.2d 628, 631 (Fed. Cir. 1987) (“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.”).

B. Issue

Whether claims 28-30 are indefinite.

Whether claims 28-30 are anticipated by Timmons, *et al.*

C. Legal Standard

In order for a reference to be anticipated by a reference, that reference must disclose each and every element of the claimed invention. See *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 632 (Fed. Cir. 1987) (“A claims is anticipated only if each and every element as set forth in the claim is found, either expressly or inherengly described, in a single prior art reference.”); see also *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989) (“The identical invention must be shown in as complete detail as is contained in the ... claim.”). Thus, Timmons, *et al.* is not properly citable as a reference under 35 USC §102.

D. Differences between the Appealed Claims and the Cited References

Timmons, *et al.* is directed to wetness indicators for absorbent pad assemblies in which the pad assemblies have light-transmitting back sheets. The wetness indicators, depicted in one embodiment, are alphabet blocks with letters printed thereon with a coloring agent. The outline of the blocks is printed with a permanent ink which will not dissolve.

However, the letters are printed with a water-soluble coloring agent which dissolves when wet. The disappearance of the letters is an indication that the article has been wet.

The Examiner contends that Timmons, *et al.* discloses both the wetness indicator graphics and the unregistered character graphics of the present invention. Support for the presence of the unregistered character graphics is alleged to be found at col. 3, lines 41-56, and in Figs. 5 and 6. This interpretation of the reference as applied to the unregistered character graphics is disputed by applicants as explained above.

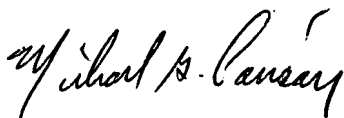
(viii.) **Evidence Appendix**

None.

(ix.) **Related Proceedings Appendix**

As set forth in Paragraph ii of the Appeal Brief, there are no related proceedings.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michael G. Panian".

Michael G. Panian
Attorney for Appellant
Reg. No. 32,623

CLAIMS APPENDIX

28. (Previously amended) A method of making an absorbent article comprising:

- providing a top sheet;
- providing a back sheet;
- providing an absorbent core and positioning the absorbent core at least partially between the top sheet and the back sheet;
- positioning at least one wetness indicator graphic at least partially between the back sheet and the absorbent core; and
- positioning at least one unregistered character graphic in a waist portion of the absorbent article by a process comprising:
 - providing a web having printed therein a repeating series of character graphics;
 - cutting the web at predetermined intervals; and
 - positioning the web in the waist portion of the absorbent article;

wherein the wetness indicator graphic and unregistered character graphic are related to one another, but not interactively interrelated.

29. (Original) The method as claimed in claim 28, wherein cutting the web at predetermined intervals comprises cutting the web at a length greater than the length of at least one set of character graphics in the repeating series.

30. (Original) The method as claimed in claim 29, wherein cutting the web at predetermined intervals results in at least one full character graphic positioned in the waist portion.



TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

10

Application Number

10/668,599

Filing Date

September 24, 2003

First Named Inventor

Stacy J. Driskell, et al.

Art Unit

3761

Examiner Name

Michele Kidwell

Attorney Docket Number

28135

ENCLOSURES (Check all that apply)



Fee Transmittal Form



Fee Attached



Amendment/Reply



After Final



Affidavits/declaration(s)



Extension of Time Request



Express Abandonment Request



Information Disclosure Statement



Certified Copy of Priority Document(s)



Reply to Missing Parts/
Incomplete Application



Reply to Missing Parts
under 37 CFR 1.52 or 1.53



Drawing(s)



Licensing-related Papers



Petition



Petition to Convert to a
Provisional Application



Power of Attorney, Revocation



Change of Correspondence Address



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Request for Refund



CD, Number of CD(s) _____

☐ Landscape Table on CD

Remarks



After Allowance Communication to TC



Appeal Communication to Board
of Appeals and Interferences



Appeal Communication to TC
(Appeal Notice, Brief, Reply Brief)



Proprietary Information



Status Letter



Other Enclosure(s) (please identify
below):

Return postcard

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name

Tyco Healthcare Retail Group, Inc.

Signature

Printed name

Michael G. Panian

Date

May 25, 2007

Reg. No.

32623

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Signature

Typed or printed name

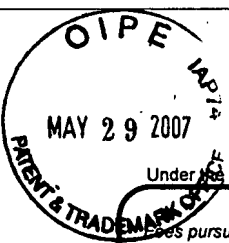
Michael G. Panian

Date

May 25, 2007

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Effective on 12/08/2004.

Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

**FEE TRANSMITTAL
For FY 2007**☐ Applicant claims small entity status. See 37 CFR 1.27**TOTAL AMOUNT OF PAYMENT** (\$) 500.00**Complete if Known**

Application Number	10/668,599
Filing Date	September 24, 2003
First Named Inventor	Stacy J. Driskell, et al.
Examiner Name	Michele Kidwell
Art Unit	3761
Attorney Docket No.	28135

METHOD OF PAYMENT (check all that apply)☐ Check ☐ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): _____☒ Deposit Account Deposit Account Number: 503005 Deposit Account Name: Tyco Healthcare Retail Se

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☒ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, except for the filing fee☒ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☒ Credit any overpayments**WARNING:** Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.**FEE CALCULATION****1. BASIC FILING, SEARCH, AND EXAMINATION FEES**

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	0
Design	200	100	100	50	130	65	0
Plant	200	100	300	150	160	80	0
Reissue	300	150	500	250	600	300	0
Provisional	200	100	0	0	0	0	0

2. EXCESS CLAIM FEES**Fee Description**

Each claim over 20 (including Reissues)

Fee (\$)	Small Entity Fee (\$)
50	25

Each independent claim over 3 (including Reissues)

200	100
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Multiple dependent claims

360	180
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Total Claims	Extra Claims	Fee (\$)	Fee Paid (\$)
0	- 20 or HP = 0	x 0	= 0

HP = highest number of total claims paid for, if greater than 20.

Indep. Claims	Extra Claims	Fee (\$)	Fee Paid (\$)
0	- 3 or HP = 0	x 0	= 0

HP = highest number of independent claims paid for, if greater than 3.

Multiple Dependent Claims	
Fee (\$)	Fee Paid (\$)
0	0

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
0	- 100 = 0	/ 50 = 0 (round up to a whole number) x 0	= 0	

4. OTHER FEE(S)

Non-English Specification, \$130 fee (no small entity discount)

Fees Paid (\$)
0

Other (e.g., late filing surcharge): Appeal Brief

500.00

SUBMITTED BY

Signature	<i>Michael G. Panian</i>	Registration No. (Attorney/Agent)	32623	Telephone	610-878-3314
Name (Print/Type)	Michael G. Panian			Date	May 25, 2007

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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